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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/772,243

02/06/2004

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15740.005

8954

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12/26/2007

EXAMINER

ROBINSON, KEITH O NEAL

ART UNIT

PAPER NUMBER

1638

MAIL DATE

DELIVERY MODE

12/26/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/772,243

Applicant(s)

CARMAN, JOHN G.

Examiner

Keith O. Robinson, Ph.D.

Art Unit

1638

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 28 November 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-10, 13-18 and 29-36.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments, filed November 28, 2007, with regards to the USC 103 rejection of claims 1-10, 13-18 and 29-36 on pages 3-6 of the Office Action mailed June 28, 2007 are not persuasive. Applicant argues that Bashaw fails to teach or suggest the critical steps of the claimed invention and that Bashaw also fails to teach apomixes production with respect to *Antennaria*, *Sorghum* or *Tripsacum* (see page 8, last paragraph of 'Remarks' filed November 28, 2007). This is not persuasive. Bashaw does teach a method of producing angiospermous apomictic plants comprising selecting sexual plants, hybridizing sexual plants with apomictic plants, recovering hybrid seed, and selecting a hybrid plant that is apomictic to the apomictic parent plant (see page 59, Figure 3). Also, the plants taught by Bashaw would possess divergent reproductive schedules of ovule development because Bashaw teaches that the sexual plant is heterozygous for method of reproduction (see page 58, 1st full paragraph). One of ordinary skill in the art would understand that other sexual plants could be used in the method taught by Bashaw. Applicant argues that Savidan fails to remedy the deficiencies of Bashaw (see page 9, 1st paragraph of 'Remarks' filed November 28, 2007). This is not persuasive. Bashaw is deficient in that it does not teach cytoembryological identification or chromosome doubling of apomictic plants. However, Savidan does remedy the deficiency of cytoembryological identification of apomictic hybrids between sexual and apomictic plants (see page 468, 1st column, last paragraph to 2nd column, paragraphs 1 and 2 and Table 2). Though Savidan does not teach cytoembryological identification of sexual plants having divergent reproductive schedules, one of ordinary skill in the art would understand that cytoembryological identification can be used to identify sexual plants having divergent reproductive schedules because Savidan teaches "embryological test [are] more rapid than progeny test because the former is applied to the plant itself" (see page 468, 2nd column, 4th paragraph). It would be obvious to one of ordinary skill in the art to choose a first and a second plant based on the cytoembryologically ascertained development timing of the nongametophytic ovule and ovary tissues because one of ordinary skill in the art would appreciate that in order to hybridize plants it would be advantageous to use plants that have similar developmental cycles. One of ordinary skill in the art would understand that other plants could be used in the teachings of Savidan. Applicant argues that Dujardin fails to remedy the deficiencies of both Bashaw and Savidan (see page 9, 2nd paragraph of 'Remarks' filed November 28, 2007). This is not persuasive. As neither Bashaw nor Savidan teach chromosome doubling of apomictic plants, this is remedied by the teachings of Dujardin. Dujardin et al teach the chromosome doubling of apomictic plants (see page 234, Figure 3). In addition, Dujardin et al teach that a chromosome doubled plant "should [be] useful as a pollinator on tetraploid pearl millet to produce chromosome substitution lines for the purpose of developing apomictic pearl millet" (see page 234, 2nd column, lines 5-10). One of ordinary skill in the art would understand that the teachings of Dujardin et al could be used to produce other apomictic plants. Applicant argues that there is no motivation in any of the cited references to modify the method of Bashaw (see page 9, last paragraph of 'Remarks' filed November 28, 2007). KSR forecloses the argument that a specific teaching, suggestion or motivation is required to support a finding of obviousness. See the recent Board decision *Ex parte Smith*, -- USPQ2d --, slip op. at 20, (Bd. Pat. App. & Interf. June 25, 2007) (citing KSR, 82 USPQ2d at 1396).

DAVID H. KRUSE, PH.D.
PRIMARY EXAMINER

